

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LIONEL VILLARREAL,

Petitioner,

v.

CASE NO. 05-74880
HONORABLE ARTHUR J. TARNOW

WILLIE O. SMITH,

Respondent.

**ORDER GRANTING PETITIONER'S MOTION TO PROCEED
IN FORMA PAUPERIS ON APPEAL AND GRANTING IN PART
PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY**

Petitioner Lionel Villareal has appealed the Court's Opinion and Order denying his application for the writ of habeas corpus. The habeas petition alleged that:

- I. the trial court erred in allowing an expert in crime scene reconstruction to testify and speculate beyond the area of his expertise, denying Defendant his right to due process and a fair trial;
- II. the trial court erred in excluding Defendant's statements at the scene of the occurrence immediately after the alleged shooting, where the statements were part of the *res gestae* and were not hearsay, denying Defendant his due process right to a fair trial;
- III. Defendant was denied a fair trial by repeated instances of prosecutorial misconduct;
- IV. Defendant is entitled to be re-sentenced before a different judge where his sentencing guidelines were incorrectly scored;

- V. the trial court violated Defendant's Fourteenth Amendment guarantee of due process of law of confrontation guaranteed by the Sixth Amendment, when the trial court incorrectly excluded/ruled that Melissa Mata's statements were hearsay; and
- VI. Defendant was deprived of his Fourth and Sixth Amendment rights when his defense and appellate counselors failed to litigate at trial and on direct appeal a meritorious Fourth Amendment violation.

Currently pending before the Court are Petitioner's Motion for a Certificate of Appealability and his Motion to Proceed *In Forma Pauperis* on Appeal.

Before Petitioner can appeal the Court's decision, a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22(b)(1) must issue. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the United States Supreme Court held that where a petition is rejected on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484.

Reasonable jurists could debate whether the Court was correct in its decision to deny relief on claims I - III and V - VI. Therefore, Petitioner's Motion for a Certificate of Appealability [Doc. 31, Mar. 11, 2008] is **GRANTED** in part pursuant to *Ward v. Wolfenbarger*, No. 07-2424 (6th Cir. Apr. 7, 2008) (unpublished), and Federal Rule of Appellate Procedure 22(b). A certificate of appealability may issue on claims I, II, III, V, and VI.

The Court **DECLINES** to issue a certificate of appealability on claim IV, because questions of state sentencing law, and the proper interpretation of state sentencing guidelines are not cognizable on federal habeas corpus review. *Miller v. Vasquez*, 868 F.2d 1116, 1118-19 (9th Cir. 1989); *Whitfield v. Martin*, 157 F. Supp. 2d 758, 762 (E.D. Mich. 2001). Petitioner's Motion to Proceed *In Forma Pauperis* on appeal [Doc. 33, Mar. 11, 2008] is **GRANTED**, because the appeal is taken in good faith and is not frivolous. Fed. R. App. P. 24(a)(3).

S/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: April 16, 2008

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on April 16, 2008, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Secretary